

Menzies v Moonab

2019 NY Slip Op 35059(U)

October 7, 2019

Supreme Court, Bronx County

Docket Number: Index No. 33915/2018E

Judge: John R. Higgitt

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 14

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VALLAN MENZIES,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 33915/2018E

ALLIM MOONAB, STARQUASHA KY OEASHA
THOMAS and JAJAWARA BEY,

Defendants.
-----X

John R. Higgitt, J.

Upon plaintiff’s May 30, 2019 notice of motion and the affirmation, affidavit, and exhibits submitted in support thereof; defendant Moonab’s June 25, 2019 affirmation in opposition and the exhibit submitted therewith; the July 26, 2019 affirmation in opposition of defendants Thomas and Bey (“the Thomas defendants”); plaintiff’s August 1, 2019 affirmation in reply; and due deliberation; plaintiff’s motion for partial summary judgment on the issue of defendants’ liability for causing the subject motor vehicle accident and for dismissal of defendants’ affirmative defenses of plaintiff’s culpable conduct is granted in part.

This is a negligence action to recover damages for personal injuries plaintiff sustained in a motor vehicle accident that took place on December 14, 2018. In support of her motion, plaintiff submitted the pleadings and her affidavit. Plaintiff averred that at the time of the accident she was a passenger in the Thomas defendants’ vehicle, which was in the process of backing up into a parking space, when defendant Moonab’s vehicle sideswiped the Thomas defendants’ vehicle.

In opposition to plaintiff’s prima facie showing of entitlement to judgment as a matter of law on the issue of his liability, defendant Moonab failed to raise a triable issue of fact. The affirmation of counsel alone is not sufficient to rebut plaintiff’s prima facie showing of entitlement to summary judgment. In addition, bald, conclusory allegations, even if believable,

are not enough to withstand summary judgment (*see Ehrlich v American Moninger Greenhouse Mfg. Corp.*, 26 NY2d 255 [1970]).

Defendant Moonab challenges the admissibility of plaintiff's affidavit. An affidavit by a person having knowledge of the facts is admissible evidence on a summary judgment motion (*see Viviane Etienne Med. Care v Country-Wide Ins. Co.*, 25 NY3d 498 [2015]). An affidavit submitted by an interested party is competent evidence and may be sufficient to discharge the interested party's summary judgment burden (*see Miller v City of New York*, 253 AD2d 394, 395 [1st Dept 1998]).

Defendant Moonab further asserts that the motion is premature because depositions have not been completed. This motion, however, is not premature because the information as to how the accident occurred reasonably rests within defendant Moonab's own knowledge (*see Rodriguez v Garcia*, 154 AD3d 581, 581 [1st Dept 2017]; *see Castaneda v DO & CO New York Catering, Inc.*, 144 AD3d 407 [1st Dept 2016]). The mere hope that a party might be able to uncover some evidence during the discovery process is insufficient to deny summary judgment (*see Castaneda, supra*; *Avant v Cepin Livery Corp.*, 74 AD3d 533 [1st Dept 2010]; *Planned Bldg. Servs., Inc. v S.L. Green Realty Corp.*, 300 AD2d 89 [1st Dept 2002]). Notably, defendant Moonab did not provide an affidavit in connection with this motion, and no reason was given for his failure to do so.

Plaintiff failed to make a prima facie showing of entitlement to judgment as a matter of law on the issue of the Thomas defendants' liability. Plaintiff offered no evidence suggesting that defendant Thomas operated the Thomas defendants' vehicle in a negligent manner. Plaintiff's affidavit merely established that defendant Thomas was attempting to park the Thomas defendants' vehicle at the time of the accident. Defendant may or may not been negligent, but on

the limited facts in the motion record, the court cannot say that, as a matter of law, defendant Thomas was negligent.

The aspect of plaintiff's motion seeking dismissal of defendants' affirmative defenses alleging plaintiff's comparative fault is granted. Under the circumstances, the "innocent passenger" plaintiff is entitled to dismissal of defendants' affirmative defense of comparative fault (*see Oluwatayo v Dulinayan*, 142 AD3d 113 [1st Dept 2016]).

Accordingly, it is

ORDERED, that the aspect of plaintiff's motion for partial summary judgment on the issue of defendant Moonab's liability for causing the accident is granted; and it is further

ORDERED, that the aspect of plaintiff's motion seeking dismissal of defendants' affirmative defenses alleging plaintiff's culpable conduct is granted; and it is further


ORDERED, that the Thomas defendants' second and fifth affirmative defenses alleging plaintiff's comparative fault are dismissed, and defendant Moonab's first affirmative defense is dismissed; and it is further

ORDERED, that plaintiff's motion is otherwise denied.

The parties are reminded of the February 7, 2020 compliance conference before the undersigned.

This constitutes the decision and order of the court.

Dated: October 7, 2019



John R. Higgitt, A.J.S.C.